The end of what was wrong from the beginning? Protection of 'not original writings' under the Dutch Copyright Act

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14. The end of what was wrong from the beginning? Protection of 'not original writings' under the Dutch Copyright Act

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This paper is dedicated to a very valuable sparring partner on a wide range of IT Law topics.

14.1 Introduction

Since 1998 I have been working at the Computer/Law Institute on Artificial Intelligence & Law, since 1999 also on Information Technology Law. In the latter domain I have worked on several projects with Rik Kaspersen. For instance, in 2000 we advised the Dutch government on the consequences of information technology for the Freedom of Information Act (Bergfeld, Kaspersen & Lodder 2001), in 2002 we edited a commentary on the main European Directives in the field of e-commerce (Lodder & Kaspersen 2002), in 2004 we discussed the technical and legal aspects of unsolicited commercial communication *aka* spam (Lodder *et al.* 2004), in 2006 we advised the Dutch government on electronic signatures and criminal proceedings (Lodder & Kaspersen 2006), and in 2008 we worked on a project with the group of Wouter Stol (Leeuwarden) on filtering and child pornography (Stol *et al.* 2008). I always enjoyed doing research with Rik Kaspersen, or having discussions on various IT law topics. To me Rik Kaspersen is first and foremost a dedicated researcher. He never really liked administrative duties, but was always eager in trying to solve legal problems. In doing so he was often thorough. During the 2008 research on filtering he analysed the Police Act, and finally came to the conclusion that the Dutch police did not have a legal basis to perform filtering activities but only after checking his findings with both Criminal Law and Administration Law professors.

The title of this chapter would be very offensive, if it was meant to reflect Rik Kaspersen's professorship. As the subtitle shows, it is of course not intended as such. Rather, this chapter is on one of the strangest parts of Dutch copyright law. Copyright law stems from the time of the printing press, and information technology leads to many paradoxical situations: the fact that uploading of illegal copies is forbidden and downloading is allowed,[2] the fact that a class of students with a copy of a copyright protected work are either violating copyright law (if I gave it to them) or not (if they made the copy themselves), etc. The issue discussed in this paper is covered in our Media Law course. Interestingly enough, when I discussed this with Rik Kaspersen around the turn of the millennium we thought that it would not last that long before the law would change. It still has not…

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1 http://lodder.cli.vu

2 In a recent verdict this assumption has been questioned, Rb. 's-Gravenhage 25 juni 2008, LJN BD5690.

14.2 The protection of not original writings

An important characteristic of a work to is that they should be original. For instance, in title 17 (entitled 'copyrights') of the United States Code, § 102 states: 'copyright subsists (...) in *original* works of authorship (...)'. Article 10 of the Dutch Copyright Act indicates what should be considered as literary, scientific or artistic work by mentioning a broad selection of works such as books, musical works, sculptures, geographical maps, etc. Originality follows implicitly from the examples, but is only explicitly mentioned in case law.[3]

14.3 (...) and *all* other writings

Let us take a close look at article 10.1 under 1°,

1. For the purposes of this Act, literary, scientific or artistic works includes:
   1°. books, pamphlets, newspapers, periodicals *and all other writings*;

What is meant by the italicized phrase 'and all other writings'? In the first place, it expresses that besides books, pamphlets, newspapers, and periodicals, also other writings can be copyright protected. That is, all other *original* writings. So far, so good. In the second place, it also indicates that writings that do not have an original character can -under circumstances- be copyright protected.[4] On this point the Copyright Act is rather unique in the world.[5]

It comes down to the following. The phrase 'and all other writings' refers to: original works and not original works. This means that if a writing is original it is copyright protected, and if a writing is not original it is copyright protected. Does it also imply that *all* writings are copyright protected? From a logical point of view this seems to be the consequence. Hence, a writing will be either original or not original. However, as well as an original writing has to meet certain standards to be called original, the same holds for not original writings. So not all writings are protected, only those that meet standards of originality and those that meet (lower) standards of not original writings (see section 1.5). Examples of not original writings are catalogues, timetables, phonebooks, lists of best-sellers.[6]

The reason that writings that lack the originality necessary for ordinary copyright protection are protected anyway, is given in by the idea that simply copying these not

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[3] Dutch Supreme Court, 29 November 1985, *NJ* 1987, 880 (*Screenoprints/Citroën*), in Dutch: 'een eigen, oorspronkelijk karakter, dat het persoonlijk stempel van de maker draagt'. See also Dutch Supreme Court, 4 January 1991, *NJ* 1991, 608 (*Van Dale/Romme*).

[4] See Hugenholtz (1989, p. 42): 'No copyright topic rouse the emotions of Dutch lawyers so heavily, so often and for such a long time as the protection of writings without an original character'.

[5] This right is comparable to (but not the same as) the protection of catalogues in Scandinavia.

[6] For an overview and references to judgements, see Spoor & Verkade (1993, p. 72); Hugenholtz (1989, p. 109).

original writings would be unfair. Hence, the persons who created the not original writings have put effort into creating them. If simply copying of for example a phonebook would be allowed, the original collector of the data would be confronted with a rival who could sell the same phonebook for a lower price.[7] Namely, the rival saved the costs of collecting the data. It seems reasonable to protect the creator of the not original writings, but dealing with this issue seems to be a subject of competition law or tort rather than copyright law. Why is it covered by the Copyright Act?

Before going into that question, first another objection from a logical point of view. To me it is incomprehensible that the original works of the opening line of article 10 ('literary, scientific or artistic works') do include not original writings. I continue with explaining why the legislator wanted to include the protection of not original works (which is also questionable), but why could not it be laid down in a separate article?

14.4 1912, Genesis of the Copyright Act

The current Copyright Act was enacted in 1912. One of the reasons to include the protection of not original writings in the Copyright Act was that according to the legislator it was a generally accepted opinion that protection of not original writings belonged to the Copyright Act.[8] Moreover, because the act of 1912 was generally extending the rights of owners of copyright, a restriction on this point was not deemed appropriate.[9]

Another reason to include the protection of not original writings was a judgement of the Supreme Court in 1910.[10] In the so-called 'the misses from Zutphen case'[11] tort was interpreted in a very restricted way. An *unlawful* act against another person was restricted to:
1. A violation of a right;
2. An act or omission violating a statutory duty.

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7 See on this topic the decision of the Supreme Court of the United States, 9 January 1991 argued, 27 March 1991 decided, Feist Publications, *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

8 See Hugenholtz (1989, p. 44), who doubts that there really existed a consensus on this point. For example, the famous lawyer Paul Scholten dedicated in that period even three papers on this topic. He argued against including the protection of not original writings in the Copyright Act (*WPNR* 2209, 2211, 2212). According to Van Engelen (1987) lawyers were unanimous against protection of not original writings in the Copyright Act: 'Handhaven van geschriftenbescherming werd vervolgens door de schrijvers echter unaniem van de hand gewezen.'

9 See Gerbrandy (1988, p. 75).

10 Cf. Van Engelen (1987).

11 Dutch Supreme Court, 10 June 1910, *W.* 9038 (*de Zutphense juffrouw*).

It was not until the renown 1919 *'Lindenbaum-Cohen'* case that an unlawful act was extended to also include an act or omission violating a rule of unwritten law pertaining to proper social conduct.[12] Only according to this broader definition of an unlawful act, a claim of unfair competition can be based on tort. Namely, unfair competition is an example of an act violating a rule of unwritten law pertaining to proper social conduct. From this perspective it is interesting to note that the *Lindenbaum-Cohen* case actually was about unfair competition. Anyway, from 1919 onwards protection of not original writings in the Copyright Act was no longer necessary. A person who commits an unlawful act towards another (e.g. copying not original writings without permission) which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof. But the protection of not original writings in the Copyright Act remained after 1919, not in the last place because the protection also applied to data that are used to compile radio and TV guides. A series of judgements has been passed over the years on cases about 'broadcasting data'.

14.5 Broadcasting data

The public broadcasting corporations in the Netherlands (since the end of the 1980s the Netherlands also has commercial broadcasting corporations) depend financially greatly on the sale of radio and TV guides. Each attempt of others (e.g. publishers) than these broadcasting corporations to compile radio and TV guides has led to lawsuits. The scope and definition of the protection of not original writings (broadcasting data are an example of not original writings) were crystallized in several Supreme Court judgements on this matter.[13] The main elements are the following:

- protection only if it is in writing, and data as such (apart from them being written down) are not protected;
- protection only if the writing is (meant to be) public;
  A personal diary (that often will be copyright protected as a literary work, e.g. the diaries of Anne Frank) or calendar do not fall under the scope of the protection since they are not meant to be public. Note that while normally it is the exclusive right of the copyright owner to communicate a work to the public, here the intend to communicate to public is a necessary condition for protection as not original writing.
- processing of data;
  If the data are not simply copied, but are processed, a new copyright protected work originates (most likely a not original writing).
- provable derivation.
  If someone believes that another has used his writings, he must prove that the other has derived the information from his writing.

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[12] Dutch Supreme Court, 31 January 1919, *NJ* 1919, p. 161 (*Lindenbaum-Cohen*). See also the current article of the Dutch civil code, art. 6:162 BW. See on the development of tort in this period Van Maanen (1986, chapter 3-5).

[13] Dutch Supreme Court, 17 April 1953, *NJ* 1954, 211; Dutch Supreme Court, 27 January 1961, *NJ* 1962, 355; Dutch Supreme Court, 25 June 1965, *NJ* 1966, 116 (*Televizier*).

Especially because of the last condition (from the *Televizier* judgment of 1965, see footnote 13) this victory of the broadcasting corporations was called a Pyrrhic victory (apparent victory).[14] The burden to prove that someone has derived his writings from yours (not original writings!) is obviously a hard one. However, the broadcasting corporations were lend a helping hand by the legislator. In the Broadcasting Act[15] (article 22, 23)[16] a reversed burden of proof was introduced. The protection of not original works is misplaced in the Copyright Act, the introduction of articles 22 and 23 of the Broadcasting Act made the right even more out of place. Publishers that wanted to compile radio and TV guides now had to prove that they did not derive (directly or indirectly) their information from the data of the broadcasting corporations. To me it seems that this burden of proof can never be met. If the information is not derived from the data of the broadcasting corporations directly, it must be derived from these data indirectly. It is exactly the same as asking to prove that a timetable of trains is not derived (in)directly from the railroad company. Since trains can only ride if the railroad company has scheduled this, by definition any timetable is derived (in)directly from the information of the railroad company. Not surprisingly, no one has yet successfully yield the burden of proof.

However, there is another way to obtain broadcasting data. In article 58.2 of the Media Act is laid down that it is possible to obtain a licence that allows to publish the broadcasting data.[17] Related to this license topic is yet another lawsuit about the broadcasting data, at the beginning of 1998 before the president of the Court of The Hague.[18] This judgement is an interesting one, amongst others because the reason why the plaintiffs started the lawsuit had to do with a judgement of the Authority on Competition Law matters (NMa).[19] The NMa had decided that the broadcasting corporations misused their market position by not giving licenses for a reasonable (conform the market) price. This again shows that competition law and protection of not original writings are interwoven. Because the matter was settled in summary proceedings the president could not solve all -complicated- aspects of the case. The broadcasting corporations won. The publisher had to stop the publication of the broadcasting data in a Radio & TV guide. However, this prohibition was valid only until the NMa-case had reached their final decision (the broadcasting corporations had appealed against the decision of the NMa). In his annotation on the verdict, Hugenholtz called the victory of the broadcasting corporations – understandably – a Pyrrhic victory! Given the history of the battle on the broadcasting data his wording is ironic. Normally, in case of a Pyrrhic victory, the winner is so weakened that he is not able to enjoy his victory. After their previous Pyrrhic victory (in 1965,

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[14] See Spoor & Verkade (1993, p. 79).

[15] In Dutch: De omroepwet.

[16] Currently article 58 and 59 of the Media Act (in Dutch: de Mediawet).

[17] Except for one broadcasting organization, Veronica, no one ever has obtained such a licence. Veronica was a public broadcasting corporation until it became a commercial broadcasting corporation in the mid 1990s.

[18] On 5 January 1998, Pres. Rb. 's-Gravenhage, *Mediaforum* 1999-2, p. 70-73: Broadcasting corporations (NOS, AVRO, KRO, NCRV, EO, TROS, VARA, VPRO) vs. the Dutch publisher/newspaper Telegraaf.

[19] In Dutch: Nederlandse Mededingings Autoriteit.

see above), however, the broadcasting corporations could enjoy their victory for almost 35 years. It is hard to imagine that the next period of enjoyment would be very long. However, at long last (2004) the court ruled in favor of the broadcasting corporations, and in 2008 the not original writing protection is still regularly used in court proceedings.

14.6 A mysterious consideration of the Supreme Court

One of the considerations by the president of the court of The Hague in the just discussed case dealt with the 'processing of data'. The president derived the following argument from the series of judgements on broadcasting data: there is no copyright infringement on a not original writing if a new writing is not a simple copy of this not original writing. In scheme, this can be represented as follows.

> A is a not original writing,
> B is not a simple copy of A,
> So: no infringement

In his annotation Hugenholtz[20] claims that the president misinterpreted the case law on not original writings. By the way, Hugenholtz does not blame the president for that, since he realizes that the case law on this topic is rather complicated. According to Hugenholtz, a new work originates if a writing is not a simple copy of a not original writing. Nevertheless, it is possible that the new work infringes on the not original writing it is not a simple copy of. So, there is room for infringement, despite the fact that a new work originates. In scheme, this looks as follows.

> A is a not original writing,
> B is not a simple copy of A,
> So: B is a new work that is copyright protected, but it is possible that B infringes on A.

The following consideration of the Supreme Court[21] is at stake here:

> 'therefore the author of a not original writing has no copyright on a work that is derived from it -and as a consequence maybe infringes on his writing- but that cannot be considered as a simple copy'[22]

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[20] *Mediaforum* 1999-2, p. 72 (see footnote 192190).

[21] Dutch Supreme Court, 25 June 1965, *NJ* 1966, 116.

[22] In Dutch: 'Overwegende daaromtrent, dat het auteursrecht op een geschrift zonder eigen of persoonlijk karakter uitsluitend berust op de opschriftstelling daarvan; dat daarom aan de maker van zulk een geschrift geen auteursrecht toekomt op een door een nieuwe opschriftstelling tot stand gekomen werk waarvan de inhoud wel is ontleend aan dat geschrift – en dat dientengevolge wellicht inbreuk maakt op het auteursrecht op dat geschrift – maar dat niet als een eenvoudige herhaling van de opschriftstelling van dat geschrift is te beschouwen;'

In scheme the considerations read as follows:

> Z is the author of the not original work A
> Y has created a new work B
> Y did not simply copy A
> So: Y has created a new copyright protected work B, but it is possible that Y infringed the rights of Z (and, not relevant for the current analysis: Z has no copyrights on the work B).

It seems that Hugenholtz is right. The question is, however, whether there is any room left for infringement in the current situation. Recall, that the reason for the protection of not original writings is that a person Y may not profit, by simply taking over these writings, from the efforts a person Z put into, for example, collecting data. Assume that a person Z collected broadcasting data and has organized these by channel and for each channel put the data in chronological order. By the way, this is what the broadcasting corporations do in the Netherlands and how their Radio and TV guides are organized. Now assume that a person Y takes as a starting point these data organized by channel. He does not simply copy these data, but organizes them differently, namely by genre (movie, sports, news, games, etc.). In that case a new (not original work) has originated. Hence, the person Y has put effort into creating the work, has not simply copied the prior work, and he will therefore be protected. No one will deny that. But how could he have infringed the rights of Z, if only the writing as such is protected and not the data contained in the writing? The new writing is seemingly different.

A possible counter-argument could be that it depends on the effort put into creating the new work. Then there must be a situation in which the new writing B is too much like the old writing A and therefore infringes, but the effort put into creating the new writing B was enough for obtaining copyright protection (so not simply copied). It seems to me that as soon as one speaks of a new copyright protected work, it is no longer possible that this new work is an infringement of the other work it is derived from. These two cannot overlap.

Still, there is one other exception I can think of. Assume that the person Y does not reorganize the data, but simply takes them over … in a different language! Translating the data is not simply copying, and probably no one denies that a new work has originated. Also in case an original work (for instance a novel) is translated, the translation is a new copyright protected work. However, then there has been an infringement (article 13 of the Copyright Act, see above), unless the copyright owner of the book has given his permission. But is this also the case if a not original writing is translated? If broadcasting data are translated, is there an infringement? Support for this option can be found in Verkade & Spoor (1985, p. 61): ‘in case of translation there can be infringement’. However, in a later edition they added: ‘no infringement … if the new work is not a simple copy’ (Spoor & Verkade 1993, p. 79).

But, can a translation be considered a simple copy? I do not believe so. Their change of minds, was given in by the following interpretation of the above consideration of the Supreme Court. Spoor & Verkade[23] call the phrase ‘and as a

[23] Spoor & Verkade (1993, p. 79, note 114).

consequence maybe is an infringement of the writing' mysterious, and from the above analysis it appears that the phrase really is mysterious: it deals with a situation that cannot occur. Spoor & Verkade interpret the phrase as follows. They say that in case the writing is not original the infringement is impossible. I do agree with that. But they add that if the writing would be a normal copyright protected work (so original), infringement would be possible. However, the writing the consideration of the Supreme Court is about is a not original writing. So their addition is besides the point. The issue is namely about not original writings. In scheme their interpretation looks as follows.

> A is a not original writing,
> B is not a simple copy of A,
> So: B is a new work that is copyright protected, and B can be an infringement of A only if A is an original work (which it is not!).

In sum, the president of the Court The Hague comes to the same conclusion as Spoor & Verkade. In case a new copyright protected work B originates, there can be no infringement on the prior not original work A. Hugenholtz interpretation is pure, but I do not see the room he sees for possible infringement. In my opinion, the Supreme Court has mentioned a situation that cannot occur. So, I follow the interpretation of Hugenholtz, but arrive at the same conclusion as the president and Verkade & Spoor.

14.7 The Database Act

A last point that needs discussion before returning to the main thesis – the protection of not original writings should be skipped from the Copyright Act – is the European directive on the protection of databases. This directive was finalized in 1996 (96/6/EG),[24] the implementation in Dutch legislation followed in 1999.[25] It deals with the protection of owners of databases. Basically, the owner of a database is protected if he has put effort in creating the database. The effort must be substantial, either in terms of 'sweat' (quantitative criterion) or 'brains' (qualitative criterion). Although the term database seems to indicate that the data must be digitized, also collections of non digital data are protected. There is an overlap with the protection of not original writings, recognized by the legislator: if the Database Act is applicable, the Copyright Act on protection of not original writings is not. Many cases that originally were protected under the Copyright act as not original writings, are now protected by the Database Act.[26] It is, moreover, not without reason that different from the Software Act (based on the Software directive) that was implemented as part of the Copyright Act, the Database Act is a separate Act.

[24] See *Pb EG* L77.

[25] Act stems from 8 July 1999 (1999, *Stb.* 303), and came into force on 21 July 1999.

[26] Previously, software was already excluded from the protection of not original writings (in article 10.1 Copyright Act, at the end of 12°; since the introduction of the Database Act in article 10.5).

Obviously, it is recognized that not original writing matters like the protection of databases do not belong in the Copyright Act.

14.8 Conclusion

How can the protection of not original writing be removed from the Copyright Act? The phrase 'all other writings' could be replaced by 'other writings'. It is generally accepted that in case the phrase had been 'other writings', so without the word 'all', protection of not original writings would not be part of the Copyright Act. In addition, the demand of originality could be included explicitly in the Copyright Act. Let us now recapitulate why the Copyright Act should be amended.

First, it is inexplicable that article 10 defines original works and mentions as one of the examples not original works. It is like telling someone the set of natural numbers consist of 0, 1, 2, …, n, and also –3.

Second, the 1910s legal doctrine was unanimously against the protection of not original writings under the Copyright Act 1912, primarily because it is a competition law topic, not a copyright law topic.

Third, seven years after the introduction of the Copyright Act tort became applicable to acts violating a rule of unwritten law pertaining to proper social conduct, which copying of not original writings can be headed under. Thereby regulation in the Copyright Act became unnecessary.

Fourth, the Database Act deals for a great part covers the same issue, and is not without reason implemented in a separate Act, so not included in the Copyright Act.

The only argument for regulating the protection of not original writings that is not defeated yet is that it was regulated in the Copyright Act for reasons of (legal) tradition. Although this argument was not fully correct in the first place, undeniably many cases has been added that can be considered as strengthening the tradition. Tradition is the natural enemy of progress, and tradition has outweighed the arguments for changing the Copyright Act for almost hundred years. To my opinion, it is time for progress. The sooner the protection of not original writings is removed from the Copyright Act the better.

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